



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 539 OF 2017**

**(Formerly Kisii ELC Case no. 352 of 2012 )**

**JAMES GIKEMI.....APPLICANT**

**VERSUS**

**KENNETH OLUOCH BIKO (Sued as the personal representative**

**of the estate of CHARLES OBUYA BIKO).....DEFENDANT**

**JUDGMENT**

1. The instant suit was mounted by way of an originating summons dated 28<sup>th</sup> September 2012 and filed in court on even date under Order 37 Rule 7 (1), (2) and Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 as read with section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya) the Land Registration, 2016 (2012) , the Land Act,2016 (2012) and Article 60 (1) of the Constitution of Kenya, 2010. The applicant (plaintiff) namely James Gikemi through Abisai and Company Advocates, is claiming ownership of the suit parcels of land,LR NO.SUNA EAST/WASWETA 1/13631, SUNA EAST/ WASWETA 1/13632 and SUNA EAST/WASWETA 1/13633 being part of the original land LR. NO. SUNA EAST/WASWETA 1/10211 by way of adverse possession.

2. Thus, the plaintiff is seeking the following orders;-

**a) Spent**

**b) Spent**

**c) THAT this Honourable court do declare the plaintiff to have acquired adverse possession of part of LR NO. SUNA EAST/WASWETA 1/13633,13632 and 113633 measuring 0.225 hectares.**

**d) THAT this Honourable court further order for excision of land pleaded to measuring 0.225 hectares from LR. NO. SUNA EAST/WASWETA 1/13631, 13632,113633, and the same be transferred to the plaintiff.**

**e) THAT this Honourable court be pleased to issue an injunction restraining the respondent (defendant) from interfering with the plaintiff's enjoyment of the said 0.225 hectares of the suit land herein.**

**f) THAT this court do order that the respondent pays costs of this application.**

3. The originating summons is anchored on the plaintiff's supporting affidavit sworn on 24<sup>th</sup> September 2012 and copies of the accompanying documents marked as "JG-1","JG-2", "JG-3" and JG-3 and 4(a) to 4(c) namely copies of an agreement between the plaintiff and the late **CHARLES OBUYA BIKO** , the father of the defendant as well as a death certificate thereof a certificate of confirmation of grant and certificates of official search respectively with regard to the suit parcels of land. The same is also anchored on grounds (i) to (v) on it's face. The grounds are :-

**1. THAT the plaintiff has been on the suit land for over twelve (12) years since.**

**2. THAT the occupation has been open and known to be the defendant.**

**3. THAT part of the suit land was sold to the plaintiff by the defendant's deceased father who had not transferred the sold piece of the plaintiff.**

**4. THAT the occupation has been continuous.**

**5. THAT the plaintiff planted trees and cultivated on the suit land since the time of occupation.**

4. The gist of the plaintiff's case is that on 28<sup>th</sup> April 1985, he purchased the suit parcel of land from the deceased as per an agreement for sale of land dated 28<sup>th</sup> April, 1985 and marked as "JG-1 (PEXhibit 1). That the deceased used the proceeds of the sale to educate the defendant. Consequently, the deceased marked the boundaries of the land and the plaintiff fenced of the suit parcels of land from the other portion of land of the deceased who died on 18<sup>th</sup> October 1995 as per certificate of death marked "JG-2" (PEXhibit 2) before transfer of the suit parcels of land to the plaintiff. That the defendant obtained a grant of letters of administration intestate and a certificate of confirmation of grant dated 11<sup>th</sup> July 1997 and marked as "JG-3" (PEXhibit-3).

5. The plaintiff further claims that he has since cultivated the suit parcels of land by growing maize, beans, potatoes and Sorghum thereon. That sometimes in the year 2011, the defendant encroached the suit parcels of land, destroyed its boundary features, cut down the plaintiff's mature trees planted thereon and sold part of the suit parcels of land to **LAZARUS OSOO ABILA**. That the plaintiff has been in open and uninterrupted occupation of the suit parcels of land for a period in excess of 12 years hence provoking the instant suit.

6. The defendant was duly served as discerned in an affidavit of service sworn on 22<sup>nd</sup> July, 2019 by a duly licenced court process server, Aggrey Ongiri Nyansimora. However, the defendant failed to enter appearance and or file his statement of defence in this suit.

7. Pursuant to court directions given on the 4<sup>th</sup> October 2018, hearing of the suit was by way of viva voce evidence on 22<sup>nd</sup> July, 2019. The plaintiff (PW1) relied on his statement dated 28<sup>th</sup> September 2012 in his testimony. He also relied on his list of documents of even date (PEXhibits 1 to 4 (c)).

8. In the plaintiff's submissions dated 1<sup>st</sup> August 2019, reference was made to the facts of the case. His counsel framed and analysed three (3) issues for determination namely:-

**a) Whether the plaintiff and those claiming under him has established a case of adverse possession in respect of the suit property.**

**b) Whether the plaintiff is entitled to the suit property by way of adverse possession.**

**c) Who should have cost of this suit?**

9. Counsel further submitted that the plaintiff has been in uninterrupted, open, unequivocal and peaceful occupation of the suit parcels of land for a period exceeding 34 years. That the defendant was duly served but failed to controvert the plaintiff's evidence. Counsel then relied on the case of **Jaber Mohsen Ali and another –vs- Priscillah Boit and another (2014) eKLR, Article 60 (1) of the Constitution (supra), sections 7, 13 (1) and 38 (1) of the Limitation of Actions Act (Cap 22)**, to buttress his submissions.

10. I have carefully considered the originating summons in its entirety and the plaintiff's submissions including all the authorities cited therein. I am guided by the Court of Appeal decision in **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720** with regard to issues for determination in a suit. I note the issues framed in the plaintiff's submissions and adopt them accordingly.

11. The plaintiff's claim is for title to the suit parcels of land by adverse possession as envisaged under **sections 7, 13 and 38 of the Limitation of Actions Act (supra)**. Generally, the procedure for asserting this claim is by way of originating summons as set out under **sections 37 and 38** of the same Act, **Order 37 Rule 7 (1), (2) and (3)** of the **Civil Procedure Rules, 2010** and the case of **Salim –vs- Boyd (1971) EA 550**.

12. The plaintiff contends that he has acquired ownership of an area measuring 0.225 hectares of the suit parcels of land which he purchased as shown in PEXhibit1. That he has cultivated the land openly and without any interruption for the last 34 years. In the case of **West Bank Estate Ltd -vs- Arthur (1966) 3 WLR 750**, it was held that evidence of cultivation should be definite as to the area and time.

13. In the case of **Muthuita –vs- Wanoe and 2 others (2008) 1KLR (G &F) 1024** which applied the decision in **Gatimu Kinguru –vs- Muya Gathangi (1976-80) 1KLR 317**, it was held that it is essential that adverse possession should be of the whole or a defined portion of land. PW1 has proved by his evidence including PEXhibit 1 that he has been in open and notorious occupation of 0.225 hectares of the suit parcels of land.

14. Notably, the plaintiff (PW1) testified in part that :-

***“ I seek to be declared the lawful owner of 0.225 hectares of LR NOs. SUNA EAST/WASWETA 1/13631, 13632 and 13633.....”***

15. It is trite law that possession can take different forms such a fencing or cultivation of the land in dispute; see **Kimani Ruchine and another –vs- Swift Rutherford Company Ltd and another (1976-80) 1KLR 1500** and **Titus Ong'an'ga Nyachieo –vs- Martin Okioma Nyauma and 3 others (2017) eKLR**.

16. It is revealed in the plaintiff's evidence including his statement dated 28<sup>th</sup> September 2012 at paragraphs 4,6 and 7 that he has occupied the suit parcels of land openly and uninterruptedly since 28<sup>th</sup> April, 1985. Quite clearly, he has shown that he has been in exclusive and uninterrupted possession of the suit parcels of land for a period in excess of twelve (12) years as recognized in **Salim case (supra)**

17. By PEhibits 4, the suit parcels of land are registered in the name of the defendant with effect from 11<sup>th</sup> July, 2005 under the **Registered Land Act (Repealed)**. In that regard, I approve the stand point taken by the Simpson J (as he then was ) in the case of **Wainaina –vs- Murai and another (1976-80) 1 KLR 383 at 289 ,290** where he stated thus;-

*“The land in question is registered under the Registered Land Act cited in section 37 of the Limitation of Actions Act ..... The plaintiff has been in adverse possession for more than twelve (12) years and is therefore entitled to the land.....”*

18. The rights and registration of the defendants as proprietor of the suit parcels of land has been challenged on the ground of adverse possession as noted in **Kimani Ruchine case (supra)**. Moreover, adverse possession is an overriding interest over registered land under **section 28 (h) of the Land Registration, Act (supra)**.

19. It is my finding that the plaintiff’s claim is cogent firm and uncontroverted. The rights and registration of the defendant in respect of the suit land are clearly extinguished by the plaintiff’s claim. Under **section 13 (7) (a) of the Environment and Land Court Act 2015 (2011)**, the plaintiff is entitled to preservation orders including a permanent injunction as well as orders 3,4 and 6 sought in the originating summons. The plaintiff has proved his case against the defendant on a balance of probabilities; see **Ahmed Abdul Karim –vs- Member for Land and Mines (1958) EA 436,441 .**

20. Wherefore, I enter judgment for the plaintiff against the defendant in terms of orders 3, 4 and 6 sought in the plaintiff’s originating summons dated 28<sup>th</sup> September 2012 as well as a permanent injunction restraining the defendant from interfering with the plaintiff’s enjoyment of 0.225 hectares of the suit parcels of land herein.

21. It is ordered accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 3<sup>rd</sup> day of OCTOBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Singei learned counsel for the plaintiff.

Tom Maurice – Court Assistant